

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OMAR BIBI,  
Plaintiff,  
v.  
DANIEL & YEAGER, LLC, et al.,  
Defendants.

Case No. [21-cv-04670-EMC](#)

**ORDER GRANTING DEFENDANT  
DANIEL & YEAGER'S MOTION FOR  
SUMMARY JUDGMENT**

Docket No. 78

Plaintiff Omar Bibi is a physician. He has filed a retaliation claim under 42 U.S.C § 1981 against defendant Daniel & Yeager, LLC ("D&Y"). According to Dr. Bibi, D&Y terminated his contract to provide COVID-related medical services at a field hospital located at San Quentin State Prison ("Prison") because he lodged a complaint about racially discriminatory behavior by a supervisor at the Prison.

Currently pending before the Court is D&Y's motion for summary judgment as to (1) Dr. Bibi's retaliation claim and (2) Dr. Bibi's request for punitive damages. Having considered the parties' briefs as well as the oral argument of counsel, the Court hereby **GRANTS** D&Y's motion in its entirety.

**I. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

Dr. Bibi brought this suit in June 2021, originally against four defendants including D&Y. *See* Docket No. 1. The claims against all other defendants have either been settled or dismissed, and only Dr. Bibi's claim of retaliation under Section 1981 against D&Y remains. *See* Docket

<sup>1</sup> The parties do not dispute the following facts unless otherwise noted.

Nos. 32, 55, 58, 70.

Dr. Bibi's allegations stem from his contract to provide COVID-related medical services at the Prison field hospital during the summer of 2020. The California Department of Corrections and Rehabilitation contracted with VxL Enterprises, LLC ("VxL") to provide care to inmates affected by COVID at California state prisons. *See* Docket No. 58 ("SAC") ¶ 9. VxL "set up what is essentially a field hospital" at San Quentin State Prison, *id.* ¶ 10, and contracted with two locum tenens agencies<sup>2</sup>—D&Y and Sycamore Physician Contracting, LLC ("Sycamore")<sup>3</sup>—to staff the Prison field hospital. *See* Docket No. 26 ("FAC") ¶ 13.

On July 6, 2020, Dr. Bibi entered into a contract with D&Y to provide medical services at the Prison field hospital. *See* SAC ¶ 14. Dr. Bibi's contract was to run from July 20, 2020 until August 20, 2020, and was to consist of 32 consecutive twelve-hour shifts, each running from 7 a.m. to 7 p.m. *See id.* ¶¶ 12, 14. Even though D&Y hired Dr. Bibi, it maintained no on-premises presence at the Prison field hospital. Docket No. 80 ("McDonald Decl.") ¶ 4. Instead, contracted physicians at the Prison field hospital worked under the direction of Dr. Andre Pennardt, VxL's Chief Medical Officer for that hospital. *Id.* ¶ 6; *see* Bibi Dep. Tr. at 47:10–15.

A. Dr. Bibi Had Performance Issues During His First Six Days at the Prison

Dr. Bibi's tenure at the Prison field hospital was tumultuous. On the first day of his contract, he did not arrive at the Prison until around 10 a.m., three hours after the start of his shift. *See* Bibi Dep. Tr. at 40:25–41:3, 42:2–44:10. Dr. Bibi arrived late to his shift again on days 2 and 4. *See id.* at 53:2–10; McDonald Decl., Ex. A. After he arrived late on day 4, Dr. Bibi had a phone call with Nicole Seifert and Scott McDonald, D&Y's Senior Staffing Consultant and Territory Manager-West Region, respectively. *See* McDonald Decl. ¶ 7, Ex. A. They told him to show up on time and to do what was expected of him. *See* Bibi Dep. Tr. at 70:18–71:21. Dr. Bibi then had a substantially similar phone conversation with Greg Ellner, Director of Recruitment at

<sup>2</sup> A locum tenens agency "operates like a staffing agency, and contracts with physicians to work for [the firm's] healthcare clients on an independent contractor basis." Docket No. 80 ("McDonald Decl.") ¶ 3.

<sup>3</sup> Erroneously named as Sycamore Provider Contracting, L.L.C. (Docket No. 32.)

1 D&Y. *See id.* at 76:22–77:21; McDonald Decl., Ex. D.

2 Dr. Bibi’s performance issues did not stop at tardiness. On day 3, Dr. Bibi left the prison  
3 without approval to purchase food. *See* Bibi Dep. Tr. at 63:1–64:10. On day 5, Dr. Bibi  
4 misplaced his California Department of Corrections and Rehabilitation Identification Card. *See id.*  
5 at 92:16–18. That same day, Dr. Bibi failed to sign out of the Prison in violation of the Prison’s  
6 security policy, possibly because he did not know about the sign-out protocol. *See* McDonald  
7 Decl. ¶ 9; Bibi Dep. Tr. at 64:11–25.

8 As a result of failing to sign out on day 5, Dr. Bibi could not find his patient list on the  
9 morning of day 6. *See* McDonald Decl., Ex. C. That morning, Dr. Pennardt reported that he “saw  
10 [Dr. Bibi] walk into the physician’s room at 0717,” 17 minutes after the start of his shift.  
11 McDonald Decl. ¶ 10, Ex. C. Later on day 6, Dr. Bibi was involved in a disagreement with Dr.  
12 Pennardt and another provider over who was responsible for taking care of a patient experiencing  
13 chest pains. *See* McDonald Decl., Ex. C. That same day, Dr. Bibi went to a nursing station  
14 without wearing the proper personal protective equipment (“PPE”). *See id.*

15 On day 6, Dr. Pennardt sent an email to VxL detailing the issues with Dr. Bibi’s conduct.  
16 *See* McDonald Decl., Ex. C. That email discussed (1) that Dr. Pennardt saw Dr. Bibi walk into the  
17 physician’s room at 7:17 a.m. on day 6, (2) that Dr. Bibi did not sign out from the Prison on the  
18 night of day 5 and therefore could not find his patient list on day 6, (3) that Dr. Bibi failed to take  
19 care of a patient with chest pains on day 6, (4) that Dr. Bibi walked to a nursing station without  
20 proper PPE on day 6, and (5) that Dr. Bibi fell asleep at work around 5:00 p.m. on day 6.<sup>4</sup> That  
21 email was eventually forwarded to McDonald at D&Y. *See id.*

22 B. On Days 8 and 9, D&Y and Its Partners Decided to Terminate Dr. Bibi’s Contract

23 On day 8, in response to Dr. Pennardt’s email, McDonald sent an email to other D&Y staff  
24 members advocating for terminating Dr. Bibi, explaining:

25 We need to let Bibi go to correct the ship. We have cause. Multiple  
26 instances of cause. He is litigious, but again, we have cause.

27  
28 <sup>4</sup> Dr. Bibi disputes that he ever fell asleep at work. *See* Bibi Dep. Tr. at 96:23–97:9.

1 *Id.* Ellner responded that he “[didn’t] disagree” with McDonald’s assessment, but that they should  
2 communicate with their partners at Sycamore and VxL to make sure that they had “a coalition on  
3 that decision.” *Id.*

4 McDonald started to build the coalition later on day 8. He sent an email to Sycamore,  
5 stating:

6 Dr. Bibi is still a recurring issue and we have backups to replace him  
7 that will work much better with VXL and us all. Since you write the  
8 schedule you say “when” on Bibi. We have cause to replace him as  
9 attached. Just let me know on when.

10 McDonald Decl., Ex. D. He attached Dr. Pennardt’s email from day 6 detailing some of Dr.  
11 Bibi’s performance issues. *See id.* Sycamore responded that it was “targeting a 7/29 end date for  
12 Dr. Bibi with his replacement starting on 7/30,” but needed scheduling confirmation from other  
13 doctors before solidifying its plans. McDonald Decl., Ex. E. Only a few minutes later, McDonald  
14 received a response saying:

15 VxL confirmed to terminate Bibi at the end of his shift on [day 10].  
16 [McDonald] will contact Bibi at 7pm PT to break the news. For  
17 timing and sensitivity reasons, can D&Y coordinate Bibi's travel  
18 home on [day 11]?

19 *Id.* On day 9, Sycamore emailed VxL to report that Dr. Bibi had once again shown up late for his  
20 shift. *See McDonald Decl., Ex. F.* In that email, Sycamore offered to move up Dr. Bibi’s  
21 termination from day 10 to day 9. *See id.* VxL responded that it would like for Dr. Bibi’s contract  
22 to be terminated at 6:45 p.m., near the end of his shift, on day 9. *See id.* VxL asked Sycamore to  
23 “[p]lease call or text . . . to confirm it’s done so we can get him the hell of our books ASAP.” *Id.*  
24 That email was forwarded to D&Y. *See id.* At noon that day, D&Y confirmed in an email to  
25 Sycamore that it planned to terminate Dr. Bibi’s contract on day 9, stating:

26 We will make the call at [6:45pm local time]. We will get on a  
27 conference line and I will call in Bibi.

28 *Id.* Sycamore responded that it “sound[ed] like a plan” and that it “appreciate[d] it!” *Id.*

C. On Day 9, Dr. Bibi Complained of Racially Discriminatory Conduct by Dr. Pennardt

Dr. Pennardt made two racially discriminatory remarks to Dr. Bibi on day 8 or 9. *See Bibi*

1 Dep. Tr. at 124:7–22 (testifying to timing). First, Dr. Pennardt told Dr. Bibi that “if you look up  
2 Omar Bibi, you find seven felonies.” *Id.* at 122:7–9. Second, after another doctor remarked that  
3 Dr. Bibi had prepared a good-looking lunch and that he should open a restaurant, Dr. Pennardt  
4 said that “Dr. Bibi would serve a lot of hummus at the restaurant, but would make for a better gun  
5 runner or drug dealer.” *Id.* at 136:6–13. Dr. Bibi further testified that Dr. Pennardt’s “demeanor  
6 toward [him] drastically changed” after Dr. Pennardt learned that Dr. Bibi is of Arab Tunisian  
7 descent. *Id.* at 145:9–22.

8 At 1:46 p.m. on day 9, after D&Y had informed Sycamore that it would terminate Dr. Bibi  
9 at the end of the day, Dr. Bibi called Seibert and complained about Dr. Pennardt’s discriminatory  
10 conduct towards him. *See id.* at 130:17–22; SAC ¶ 18.

11 D. D&Y Terminated Dr. Bibi’s Contract After His Shift on Day 9

12 At or around 6:45 p.m. on day 9, several hours after Dr. Bibi had lodged his complaint  
13 about Dr. Pennardt’s discriminatory conduct, D&Y called Dr. Bibi to inform him that his contract  
14 had been terminated. *See McDonald Decl.* ¶ 15.

15 **II. DISCUSSION**

16 A. Legal Standard

17 Federal Rule of Civil Procedure 56 provides that a “court shall grant summary judgment  
18 [to a moving party] if the movant shows that there is no genuine dispute as to any material fact and  
19 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An issue of fact is  
20 genuine only if there is sufficient evidence for a reasonable jury to find for the nonmoving party.  
21 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). “The mere existence of a  
22 scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could  
23 reasonably find for the [nonmoving party].” *Id.* at 252. At the summary judgment stage, evidence  
24 must be viewed in the light most favorable to the nonmoving party and all justifiable inferences  
25 are to be drawn in the nonmovant’s favor. *See id.* at 255.

26 Where a defendant moves for summary judgment based on a claim for which the plaintiff  
27 bears the burden of proof, the defendant need only point to the plaintiff’s failure “to make a  
28 showing sufficient to establish the existence of an element essential to [the plaintiff’s] case.”

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Retaliation Claim

Section 1981 provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Although Section 1981 does not include an express retaliation provision, the Supreme Court in *CBOCS W., Inc. v. Humphries* held that it “encompasses claims of retaliation.” 553 U.S. 442, 457 (2008).

“Typically, [courts in the Ninth Circuit] apply the burden-shifting framework established in *McDonnell Douglas*” to Section 1981 claims at summary judgment. *Metoyer v. Chassman*, 504 F.3d 919, 930–31 (9th Cir. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). “At the first step of *McDonnell Douglas*, the plaintiff must establish a prima facie case of discrimination or retaliation.” *Id.* at 931 n.6. “To establish a prima facie case of retaliation, a plaintiff must prove (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two.” *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008).

“If the plaintiff makes out her prima facie case of . . . retaliation, the burden then ‘shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly [retaliatory] conduct.’” *Metoyer*, 504 F.3d at 931 n.6 (quoting *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir.2003)). “Finally, at the third step of *McDonnell Douglas*, if the employer articulates a legitimate reason for its action, ‘the presumption of discrimination drops out of the picture, and the plaintiff may defeat summary judgment by satisfying the usual standard of proof required . . . under Fed. R. Civ. P. 56(c).” *Id.* (quoting *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006)). “The plaintiff may then offer evidence that ‘the employer’s proffered nondiscriminatory reason is merely a pretext for discrimination.’” *Surrell*, 518 F.3d at 1106 (quoting *Dominguez–Curry v. Nevada Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir. 2005)).

1 The parties do not dispute the first two elements of the prima facie case of retaliation—that  
 2 Dr. Bibi engaged in protected activity and that he suffered an adverse employment action. But  
 3 D&Y challenges the causal link between the two because it contends that it had conclusively  
 4 decided to terminate Dr. Bibi’s contract before he engaged in protected activity by complaining  
 5 about Dr. Pennardt’s discriminatory conduct. *See* Docket No. 78 at 13. Thus, D&Y argues that a  
 6 reasonable jury could not conclude that it terminated Dr. Bibi’s contract because of his complaint  
 7 about Dr. Pennardt’s discriminatory conduct. *Id.*

8 Dr. Bibi first responds that the evidence, viewed in the light most favorable to him, shows  
 9 that D&Y was only contemplating terminating Dr. Bibi’s contract, not that it had conclusively  
 10 decided to terminate his contract. *See* Docket No. 81 at 6–7. Therefore, he argues that a  
 11 reasonable jury could conclude that Dr. Bibi’s protected activity was a but-for cause of his  
 12 termination simply because there was a “proximity in time” between the two events. *See id.* at 4  
 13 (citing *Dawson v. Entek Int’l*, 630 F.3d 928, 936 (9th Cir. 2011) (“The causal link can be inferred  
 14 from circumstantial evidence such as the employer’s knowledge of the protected activities and the  
 15 proximity in time between the protected activity and the adverse action.”)).

16 To support this argument, Dr. Bibi points to a single email sent by D&Y to Sycamore at  
 17 7:21 a.m. on the morning of day 8 asking Sycamore to “let [D&Y] know from a scheduling  
 18 timeline what works best on replacing [Dr. Bibi], and when *or if you want to replace him.*”  
 19 Docket No. 81-1 (“Paul Decl.”), Ex. A (emphasis added). Dr. Bibi claims that this email shows  
 20 that D&Y was still undecided about whether to terminate him as of day 8. But this email cannot  
 21 be viewed in isolation, and D&Y presents uncontroverted evidence that this email was merely the  
 22 beginning of its decision-making process and that it conclusively decided to terminate Dr. Bibi’s  
 23 contract before he engaged in protected activity.

24 First, D&Y points out that at 11:17 a.m. on day 8, it sent an email to its partners explaining  
 25 that “Dr. Bibi is still a recurring issue and we have backups to replace him that will work better  
 26 with VxL and all of us.” McDonald Decl., Exs. D, E. In that email, D&Y invited Sycamore to  
 27 “say ‘when’” on Dr. Bibi’s termination. *Id.* Sycamore responded at 11:36 a.m. that it was  
 28 “targeting a 7/29 end date for Dr. Bibi with his replacement starting on 7/30,” but needed to wait



1 for scheduling confirmation before making the final decision. McDonald Decl., Ex. E. At 11:45  
2 a.m. on day 8, D&Y was told that “VxL confirmed to terminate Bibi at the end of his shift on [day  
3 10]” and that D&Y should “coordinate Bibi’s travel home” thereafter. *Id.*

4 At 9:23 a.m. the next day, Sycamore sent an email to VxL explaining that Dr. Bibi had  
5 showed up late again that morning and asking if VxL wanted Dr. Bibi to be terminated after his  
6 shift on day 9 instead of, as was originally planned, after his shift on day 10. *See* McDonald  
7 Decl., Ex. F. VxL confirmed at 11:34 a.m. that it wanted to move up Dr. Bibi’s termination, and  
8 Sycamore shortly thereafter forwarded the email chain to D&Y. *See id.* At noon that day, D&Y  
9 told Sycamore that it would “make the call at [6:45pm],” near the end of Dr. Bibi’s shift. *Id.*  
10 Crucially, this email correspondence all happened *after* the email from D&Y which Dr. Bibi  
11 contends expresses some uncertainty about the decision to terminate Dr. Bibi’s contract and *prior*  
12 to Dr. Bibi lodging his complain about Dr. Pennardt. *See* McDonald Decl., Exs. D, E, F.; SAC ¶  
13 18 (explaining that Dr. Bibi spoke with D&Y starting at 1:46 p.m.). No reasonable jury simply  
14 could conclude that D&Y had not conclusively decided to terminate Dr. Bibi’s contract before Dr.  
15 Bibi complained about Dr. Pennardt’s discriminatory conduct.

16 Likely recognizing that the difficulty of prevailing on his first argument, Dr. Bibi next  
17 contends that even if the *decision* to terminate his contract was made before he engaged in  
18 protected activity, what matters is that D&Y did not *execute* the termination of his contract until  
19 after the protected activity. *See* Docket No. 81 at 5. This argument finds no support in case law.  
20 In fact, courts in the Ninth Circuit have explained that “[w]here timing is the only basis for a claim  
21 of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in  
22 any protected activity, an inference of retaliation does not arise.” *Saensinbandit v. Alaska*  
23 *Airlines, Inc.*, No. 3:18-CV-00267 JWS, 2020 WL 1695485, at \*6 (D. Alaska Apr. 7, 2020) (citing  
24 *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001)); *see also* *Bower v. City*  
25 *& Cnty. of San Francisco*, No. C 09-03507 CRB, 2011 WL 569882, at \*8 (N.D. Cal. Feb. 14,  
26 2011), *aff’d*, 490 F. App’x 854 (9th Cir. 2012) (citing *Slattery* for the same). The key to a  
27 retaliation claim is intent of the defendants. Intent precedes action. It is the timing of events  
28 which informs the defendants’ intent that is critical, not the subsequent implementation of that



1 intent.

2 Thus, for instance, in *Seansinbandit*, the court granted summary judgment in favor of a  
3 defendant–employer on a retaliation claim where the uncontroverted evidence demonstrated that  
4 the plaintiff’s protected activity occurred after defendant “had set up the meeting to tell Plaintiff  
5 about her termination,” even though that meeting did not occur until after the protected activity.  
6 2020 WL 1695485, at \*6. Similarly, here, the uncontroverted evidence shows that D&Y had  
7 chosen the time and method of terminating Dr. Bibi’s contract almost two hours *before* Dr. Bibi  
8 called Seibert to complain about Dr. Pennardt’s conduct. *See* McDonald Decl., Ex. F. As in  
9 *Seansinbandit*, it is immaterial that D&Y did not execute the termination of Dr. Bibi’s contract  
10 until after the protected activity occurred; the decision had been made. Dr. Bibi has thus failed to  
11 establish a prima facie case of retaliation under Section 1981 because he has failed to raise a  
12 triable issue of fact on the causal link between his protected activity and D&Y’s decision to  
13 terminate his contract.<sup>5</sup>

14 C. Punitive Damages

15 D&Y’s motion for summary judgment on Dr. Bibi’s retaliation claim is granted, leaving no

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17 <sup>5</sup> Had Dr. Bibi raised a triable issue of fact on causation, the burden would shift to D&Y to  
18 establish that it had legitimate, nonretaliatory reasons for its decision to terminate his contract.  
19 *See Metoyer*, 504 F.3d at 931 n.6. D&Y has offered many nonretaliatory reasons including Dr.  
20 Bibi’s consistent tardiness, his failure to treat a patient with chest pains, walking to a nursing  
station without proper PPE, falling asleep at work, and violating prison security policy. *See*  
Docket No. 78. The burden would then shift back to Dr. Bibi to raise a triable issue of fact as to  
the pretextual nature of D&Y’s proffered reasons. *See Metoyer*, 504 F.3d at 931 n.6.

21 Dr. Bibi argues (1) that the temporal proximity between his protected activity and his termination  
22 can by itself give rise to an inference of pretext and (2) that there are disputed issues of fact as to  
23 many of the performance issues cited by D&Y. *See* Docket No. 81 at 5. Dr. Bibi’s temporal  
24 proximity argument fails for the same reason it failed to raise a triable issue of fact as to causation:  
25 the uncontroverted evidence shows that D&Y decided to terminate Dr. Bibi before he ever  
engaged in protected activity. *See* McDonald Decl., Ex. E, F; *Barrier v. City of Dalles*, No. 21-  
35305, 2022 WL 832070, at \*1 (9th Cir. Mar. 21, 2022) (“[T]he persuasive value of the temporal  
26 proximity evidence [in showing pretext] is undercut by the fact that [the employee’s] supervisor  
27 began preparing a disciplinary memo concerning [the employee] weeks *before* [the employee]  
filed his fourth workers’ compensation claim”) (emphasis in original). Proximity in time cannot  
28 undo the sequence here. Dr. Bibi’s second argument fails because it is irrelevant since Dr. Bibi  
did not establish a prima facie case. In any event, Dr. Bibi has not raised a triable issue of fact as  
to D&Y’s genuine belief in its proffered reasons, and “courts only require that an employer  
honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.”  
*Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (internal quotation marks  
omitted).

1 remaining claims from which Dr. Bibi may request punitive damages. His argument on punitive  
2 damages therefore is denied as moot.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court hereby **GRANTS** D&Y's motion for summary  
5 judgment in its entirety.

6 This order disposes of Docket No. 78. The Clerk is instructed to enter judgment and close  
7 the case in its entirety.

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9 **IT IS SO ORDERED.**

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11 Dated: February 10, 2023

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15 EDWARD M. CHEN  
16 United States District Judge  
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